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No. 81-2338

In the Supreme Court of the United States

OCTOBER TERM, 1982

DONALD T. REGAN,
SECRETARY OF THE TREASURY, ET AL., APPELLANTS

v.

TAXATION WITH REPRESENTATION OF WASHINGTON

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE APPELLANTS

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1. In our opening brief (at 19-20), we emphasized that the lobbying limitations prescribed for certain tax-exempt organizations by Sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code of 1954 (26 U.S.C.) expressed the same policy against federal subvention of lobbying activity as the Treasury Regulations which this Court upheld against a First Amendment challenge in *Cammarano* v. *United States*, 358 U.S. 498 (1959). There, the Court approved the denial of a business deduction by a taxpayer for sums expended in an effort to defeat an initiative measure that would have seriously affected, if not wholly destroyed, his trade or business. See 358 U.S. at 500.

Contrary to appellee's argument (Br. 37), the subsequent enactment of Section 162(e) of the 1954 Code, by Section 3(a), Revenue Act of 1962, Pub. L. No. 87-834, 76 Stat. 973, does not undermine the authority of *Cammarano*. Section

162(e) now permits a business to deduct as an ordinary and necessary business expense under Section 162 an amount incurred "in direct connection with" a presentation to a legislature with respect to legislation "of direct interest to the taxpayer * * *."[1] As the court below observed, "[t]here is a significant difference between profitmaking and non-profitmaking entities, and it seems probable that each type lobbies with different motives" (J.S. App. 47a-48a). Accord, *Haswell* v. *United States*, 500 F.2d 1133, 1150 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975). Moreover, as *Cammarano* itself demonstrates, the enactment of Section 162(e) was not prompted by any constitutional principle requiring the deductibility of such expenditures but by policy considerations within Congress' power to determine. Section 162(e) therefore does not support appellee's argument that the Constitution guarantees charitable contribution deductions for payments to organizations that engage in substantial lobbying activities. Indeed, in rejecting appellee's claim that the First Amendment guarantees it the unlimited right to lobby without forfeiting its tax-exempt status and its eligibility to receive tax-deductible contributions, even the court below recognized the continuing

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[1]The relevant legislative history of Section 162(e) (S. Rep. No. 1881, 87th Cong., 2d Sess. 22-23 (1962)), indicates that Congress considered the deduction of lobbying expenditures by a business to be desirable as a matter of policy to encourage the presentation to legislators of information regarding the effect of legislation upon a taxpayer's trade or business. In addition, Congress concluded that the deduction of such expenditures as a business expense was necessary to arrive at a true reflection of the income of a business for tax purposes. *Ibid.* See *Commissioner* v. *Tellier*, 383 U.S. 687, 691-693 (1966); *Commissioner* v. *Sullivan*, 356 U.S. 27, 29 (1958). Cf. 26 U.S.C. (& Supp. V) 4911(d), added to the 1954 Code by Section 1307, Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1720-1729, which specifies that an activity by a public charity is not "influencing legislation" if it consists of appearances before or communications to a legislature concerning a matter that might affect the powers, duties, or tax status of the organization.

authority and relevance of *Cammarano* (J.S. App. 30a-35a).[2]

Contrary to appellee's further argument (Br. 38-39, 42-43), *Cammarano* cannot be distinguished on the ground that there the Court sustained the denial of deductions only for funds used for lobbying, while here the limitations of Sections 501(c)(3) and 170(c)(2) disqualify appellee from tax-exempt status and from receiving any tax-deductible

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[2]Appellee has docketed a cross-appeal (No. 82-134) seeking review of the court of appeals' holding that the lobbying provisions of Sections 501(c)(3) and 170(c)(2) do not violate its right to freedom of speech and to petition Congress under the First Amendment. In response, we filed a motion to dismiss that cross-appeal in which we argue that appellee may not seek review of an adverse holding of the court of appeals except by certiorari, and that treating the cross-appeal as a petition for certiorari, it must be denied as out of time. We advanced the same argument with respect to jurisdiction and timeliness as to certiorari in a motion to dismiss in *Beneficial Finance of Kansas, Inc.* v. *United States*, No. 81-583, dismissed as moot Dec. 13, 1982, a cross-appeal filed in connection with the government's appeal in *United States* v. *Security Industrial Bank*, No. 81-184 (Nov. 30, 1982). In our motion to dismiss, we further argue that even assuming that the Court has jurisdiction to grant certiorari, the petition should be denied because the First Amendment claim is answered fully by this Court's decision in *Cammarano*.

Contrary to appellee's argument (Br. 9, n.10) on this appeal (No. 81-2338), the fact that this case comes here on the Secretary's appeal does not permit appellee to seek review of the court of appeals' holding that the Code's lobbying provisions do not violate its First Amendment rights. As appellee views its First Amendment claim (see 82-134 J.S. 6), its acceptance by this Court would require a modification of the judgment below to ensure that it qualifies for Section 501(c)(3) status. The judgment entered, which directs a remand of the case to the district court for further proceeedings, unquestionably leaves appellee's qualification under Section 501(c)(3) in doubt. Accordingly, such a modification of a judgment may be obtained, if at all, only by a cross-appeal or by a timely cross-petition for certiorari, neither of which appellee has perfected. *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970).

contributions. As we explained in our opening brief (p. 23 n.10), appellee's disqualification is not a penalty upon its lobbying activity but follows from the longstanding requirement of the charitable exemption provisions (see Act of Oct. 3, 1913, ch. 16, Section II(G)(a), 38 Stat. 172) that accord charitable status only to those organizations organized and operated "exclusively" for a qualifying purpose. Thus, if a single activity or purpose of an organization falls outside these statutes, as does lobbying (see *Cammarano* v. *United States, supra,* 358 U.S. at 512; *Slee* v. *Commissioner,* 42 F.2d 184, 185 (2d Cir. 1930)), and is substantial in nature, it suffices to destroy the charitable exemption whether or not the organization has another activity or purpose. *Better Business Bureau* v. *United States,* 326 U.S. 279, 283 (1945). Appellee does not dispute (Br. 3 n.4) that a substantial, if not the primary, activity by which it intends to reach its goals is to lobby Congress with regard to tax legislation.[3] Its disqualification is therefore no broader than required to carry out the underlying congressional objective. Cf. *United States* v. *Harriss,* 347 U.S. 612, 622-623 (1954).[4]

2. This is not to suggest, as appellee does (Br. 5-6, 16-18), that Congress has failed to recognize that lobbying may

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[3]The court below correctly pointed to the administrative difficulty in this circumstance of tracing and disallowing charitable deductions to donors only in that proportion in which their contributions actually are used by the donee organization for lobbying (J.S. App. 74a n.52).

[4]The amicus Veterans of Foreign Wars (Br. 4-14) argues that the district court lacked jurisdiction under Section 7428 (26 U.S.C. (& Supp. V)) because that statute does not encompass constitutional challenges. We disagree. For substantially the reasons set forth by the appellee (Br. 10 n.11), we do not believe that in affording judicial review under Section 7428 of denials of tax-exempt status, Congress intended to foreclose consideration of constitutional claims such as that presented here.

further a charitable end.[5] On the contrary, the Senate Finance Committee sought unsuccessfully to structure the

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[5]The American Association of Museums, et al., as amici, point out (Br. 5-6) that many charitable organizations, including the National Audubon Society and the Girl Scouts, have supported the enactment of legislation. To the extent this is done in a non-partisan or objective fashion to facilitate an evaluation of such legislation, it will not cause forfeiture of charitable tax status. Treasury Regulations on Income Tax (1954 Code), 26 C.F.R. 1.501(c)(3)-1(c)(3)(iv). For example, in Rev. Rul. 64-195, 1964-2 Cum. Bull. 138, the Service ruled that the exempt status of a nonprofit educational organization under Section 501(c)(3) was not affected by its nonpartisan study, research and assembly of materials in connection with court reform and the dissemination of such materials to the public. The ruling emphasized that the organization did not participate in the presentation of any bill or urge the enactment of any particular proposal. Accord: Rev. Rul. 70-79, 1970-1 Cum. Bull. 127; Rev. Rul. 78-248, 1978-1 Cum. Bull. 154, amplified by Rev. Rul. 80-282, 1980-2 Cum. Bull. 178. On the other hand, an organization cannot maintain Section 501(c)(3) status if, as its principal objective, it advocates the adoption of a doctrine or theory which can become effective only by the enactment of legislation. Rev. Rul. 62-71, 1962-1 Cum. Bull. 85 (nonprofit organization formed for the purpose of supporting an educational program for the stimulation of interest in the study of economics, to promote the single tax theory of taxation, held not exempt under Section 501(c)(3)). See also *Dulles* v. *Johnson*, 273 F.2d 362, 367-368 (2d Cir. 1959), cert. denied, 364 U.S. 834 (1960).

Indeed, the terms of the statutes permit a charitable organization to retain its status even if it crosses the line to engage in legislative advocacy that does not amount to a substantial part of its overall activity. See *United States* v. *Harriss*, 347 U.S. 612, 622 n.13 (1954), collecting cases; *Seasongood* v. *Commissioner*, 227 F.2d 907, 910-912 (6th Cir. 1955). And Section 501(c)(3) organizations can also elect to quantify their lobbying activities under Section 501(h) with assurance that they will not endanger their tax-exempt status and eligibility to receive tax-deductible contributions. It does not appear that the amici organizations are comparable to appellee, which was organized for the primary purpose of influencing the tax law through lobbying (J.A. 37).

The same amici also seek (Br. 15-20) to discount the significance of the fact that an organization operated exclusively for social welfare purposes may qualify for tax exemption under Section 501(c)(4) even though it engages in a substantial amount of lobbying. Treasury Regulations on Income Tax (1954 Code), Section 1.501(c)(4)-1(a)(2)(ii) (26

lobbying restriction to reach only the selfish contribution made to advance the personal interest of the donor. 78 Cong. Rec. 5861 (1934) (remarks of Sen. Reed). Congress recognized, however, that mistakes in administration of the provision, as well as decisions giving the appearance of favoritism, could not be avoided unless the charitable contribution deduction were denied for contributions to all charitable organizations engaged in substantial lobbying. As Senator La Follette observed (*id.* at 5959), "[i]t is difficult from the administrative point of view for those in the Internal Revenue Bureau to determine when an organization is carrying on a type of activity which ought to be encouraged, and when it is carrying on a propaganda type of activity." Thus, contrary to appellee's argument (Br. 38-40), the lobbying limitation was framed to redress abuses by charitable organizations without requiring a protracted inquiry into the tactics and aims of the different types of lobbying in which they engage.

3. Nor does the equal protection guaranty require Congress to impose the same requirements with respect to the legislative activity of veterans' organizations as are applied to charitable organizations. Congress has had a longstanding interest in veterans' affairs and its standing committees devoted to this subject attest to its continuous desire to educate itself with respect to the concerns of veterans. See

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C.F.R.). Like many other affiliated organizations, appellee's predecessor organizations operated for years in tandem, one under Section 501(c)(3), the other under Section 501(c)(4), to further their ends without running afoul of the lobbying provisions. This mode of operation was abandoned, and appellee formed, merely because the dual arrangement was thought to be inefficient (J.A. 20-23). (Contributions from the public to appellee's Section 501(c)(4) predecessor were 23 % less than contributions to its Section 501(c)(3) predecessor (J.A. 20)). At all events, whether or not appellee may structure itself along dual lines (see J.S. App. 34a-35a), the constitutional provisions appellee invokes do not require that it be allowed to lobby with tax-deductible contributions.

Amici Curiae Brief of Disabled American Veterans and Paralyzed Veterans of America at 7-10, 19-29. Moreover, as we pointed out in our opening brief (at 17-18), the decisions of this Court accord wide latitude to the legislatures to draw distinctions in framing revenue statutes. The distinction drawn for this purpose between the activities of the separate categories of exempt organizations does not invite the same level of judicial scrutiny as if Congress had imposed a limitation directly on such activity. There is no indication that Congress intended to advance one viewpoint or to suppress another. The law applies even-handedly to all organizations in the designated categories regardless of the particular positions any such organization may choose to espouse. The legislative classification merely reflects the special status in our society that veterans' organizations occupy and that charitable organizations do not share (see our opening brief at 42-49). Thus, Congress' refusal to place appellee on the same tax footing as veterans' groups does not discriminate against any particular idea or point of view in a manner barred by the First or the Fifth Amendment. See *Perry Educ. Ass'n.* v. *Perry Local Educators Ass'n,* No. 81-896 (Feb. 23, 1983), slip op. 11-13. Indeed, even in the context of governmental financial assistance, this Court noted in *Buckley* v. *Valeo,* 424 U.S. 1, 93 n.127 (1976), in rejecting a comparable claim that the guaranties of free speech and equal protection were violated by statutes that funded activity by certain candidates for public office but not by others:

> Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, 47 U.S.C. §§ 390-399, and preferential postal rates and antitrust exemptions for newspapers, 39 C.F.R. § 132.2 (1975); 15 U.S.C. §§ 1801-1804.

Citizens Against Rent Control v. *Berkeley*, 454 U.S. 290 (1981), *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85 (1977), and similar decisions upon which appellee relies (Br. 21-25), are therefore inapposite. Those cases involved a prohibition placed directly upon a protected activity, and not, as here, a decision to encourage protected activity to the extent consistent with legislative policy. See *Maher* v. *Roe*, 432 U.S. 464, 475-477 (1977).[6] Indeed, appellee's position necessarily comes down to urging that any tax statute that indirectly affects the exercise of a fundamental right is itself subject to strict scrutiny and is unconstitutional. But *Cammarano* itself refutes that proposition. Similarly, while the right to marry has been characterized by this Court as a fundamental right (*Zablocki* v. *Redhail*, 434 U.S. 734 (1978)), the courts have applied a rational basis test and rejected constitutional challenges under the equal protection clause to federal tax statutes that impose higher rates upon working married couples. See, *e.g.*, *Mapes* v. *United States*, 576 F.2d 896, 901-903 (Ct. Cl.), cert. denied, 439 U.S. 1046 (1978). See also *Ensminger* v. *Commissioner*, 610 F.2d 189, 192-194 (4th Cir. 1979), cert. denied, 446 U.S. 941 (1980) (rejecting constitutional challenge to denial of dependency deduction for woman who lived with the taxpayer and was supported by him, but was not married to him).

Finally, *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Thomas* v. *Review Bd.*, 450 U.S. 707 (1981), upon which appellee relies (Br. 22-23, 42), have no bearing here. In each of those cases, the disqualification of the claimant from the receipt of all benefits was broader than required by the end

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[6]Cf. 42 U.S.C. (Supp. IV) 2996f(a)(5), which precludes a recipient of funds from the Legal Services Corporation from using them to influence the passage or defeat of any legislation; 47 U.S.C. 399, which precludes a noncommercial educational broadcasting station from editorializing and from providing support to a political candidate.

sought by the legislation. See 374 U.S. at 406-407; 450 U.S. at 718-719. The Court therefore regarded the disqualification as a penalty upon the exercise of the right affected. Here, on the other hand, the lobbying limitation provisions simply evidence Congress' refusal to subsidize certain protected activity. Since appellee's principal, if not sole, activity is lobbying, it can hardly complain that its disqualification is broader than the end sought by the legislation. Moreover, *Sherbert* and *Thomas* were decided in the significantly different context of the governmental obligation of neutrality imposed by the Establishment and Free Exercise Clauses of the First Amendment. See *Harris* v. *McCrae*, 448 U.S. 297, 317 n.19 (1980); *Maher* v. *Roe*, *supra*, 432 U.S. at 474 n.8; *Buckley* v. *Valeo*, *supra*, 424 U.S. at 93 n.127.

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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